(3)

No. 97-1008

In the Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN C. CLEVELAND, PETITIONER

v.

POLICY MANAGEMENT SYSTEMS CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that he is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case concerns the appropriate impact of an employee's application for or receipt of disability insurance benefits under the Social Security Act, 42 U.S.C. 423, on the employee's suit against her employer alleging that the employer discharged her in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*

1. a. The ADA prohibits an employer from discriminating against a "qualified individual with a disability" because of the disability. 42 U.S.C. 12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job. 42 U.S.C. 12111(8).

The determination whether a person with a disability is "qualified" "requires an individualized, case-by-case assessment of the specific abilities of the person, the specific requirements of the position that the person holds or desires, and the manner in which the person may be able or enabled to meet those requirements." *EEOC: Benefits Applications and ADA Claims* (issued Feb. 12, 1997) *reprinted in* BNA's *Americans with Disabilities Act Manual* (*EEOC Guidance*), No. 62, at 70:1251, 70:1255. The "definition of the term 'qualified individual with a disability' expressly requires consideration of whether the individual can perform [the] essential functions [of his job] with reasonable accommodation." *Ibid.* Reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." 42 U.S.C. 12111(9)(B).

b. Under the Social Security Act, 42 U.S.C. 423, as interpreted by the Social Security Administration (SSA), an individual can have a "disability" that entitles him to benefits even if he could have performed his previous job if his employer had provided him with reasonable accommodations. The Act provides that an insured individual has a "disability" and is entitled to benefits if he is unable to engage in "substantial gainful activity" because of a "physical or mental impairment" that is expected to result in death or that has lasted or can be expected to last for 12 months or more. 42 U.S.C. 423(a)(1)(D), 423(d)(1)(A). The impairment must be "of such severity that he is not

only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A).

The SSA applies a five-step process to determine whether an adult claimant qualifies for benefits. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142 (1987). First, the claimant must not be engaged in "substantial gainful activity." 20 C.F.R. 404.1520(b). Second, the claimant must have a medical impairment that is severe enough to limit significantly his ability to do basic work activities. *Id.* at 404.1520(c), 404.1521. Third, if the impairment is equivalent to one of the impairments listed by the Secretary at 20 C.F.R. Part 404, Subpart P, Appendix 1, benefits are awarded without further inquiry into the claimant's ability to perform his prior job or any other work. *Id.* at 404.1520(d), 404.1525, 404.1526; see also *Yuckert*, 482 U.S. at 153; *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983).

Fourth, if the claimant's impairment is not equivalent to one on the list, the claimant must be unable to perform his "past relevant work," see 20 C.F.R. 404.1520(e) and (f), and, fifth, he must be unable to perform any other work in the national economy, see 404.1560(c). "The fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, [is] not relevant" to that inquiry. See Daniel L. Skoler, Assoc. Comm'r, SSA, Disabilities Act Info. Mem. (June 2, 1993), *reprinted in* 2 *Social Security Practice Guide*, App. § 15C[9] (*SSA Guidance*), at App. 15-401 (MB 1997), cited in U.S. Amicus Br. at 8, in *Swanks* v. *WMATA*,

No. 96-7078 (D.C. Cir.) (*Swanks* Brief), *reprinted at* Pet. App. 43a-44a.

SSA regulations state that, if a person "believe[s]" he "may be entitled to benefits," he "should file an application," 20 C.F.R. 404.603, on forms prescribed by the SSA. *Id.* at 404.610(a), 404.611(a). The forms, often generated by SSA's computerized application system, contain standard language asserting that the applicant is "unable to work" and "disabled." See, *e.g.*, *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610, 615 nn. 2 & 3 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997); *Mohamed* v. *Marriott, Int'l, Inc.*, 944 F. Supp. 277, 279 (S.D.N.Y. 1996); *Griffith* v. *Wal-Mart Stores, Inc.*, 930 F. Supp. 1167, 1168-1169 (E.D. Ky. 1996), rev'd on other grounds, 135 F.3d 376 (6th Cir. 1998), petition for cert. pending, No. 97-1991. The forms do not suggest that a claimant may qualify the statements attesting to his disability and inability to work by noting that he would be able to work if he were provided reasonable accommodation. See *Griffith*, 135 F.3d at 382.

2. Petitioner Carolyn Cleveland began working for respondent Policy Management Systems Corporation in August 1993. Pet. App. 2a. Petitioner suffered a stroke in January 1994 and took a leave of absence from work. *Ibid.* On January 26, 1994, she signed an application for Social Security disability benefits prepared by her daughter in which she certified, using the standard language on forms generated by SSA's computerized applicat' n system, that she was "'unable to work because of [her] disabling condition on January 7, 1994' and that she was 'still disabled.'" *Ibid.* (quoting application).

In April 1994, petitioner's physician released her to return to work. Pet. App. 2a. Petitioner resumed her

job with respondent, notifying the SSA of the change in her condition. *Id.* at 2a-3a. Petitioner encountered difficulties performing her job on her return to work and asked for several accommodations to assist her. *Id.* at 3a. Respondent denied all of petitioner's requested accommodations and, in July 1994, terminated her employment. *Ibid.*

On September 14, petitioner renewed her application for disability benefits by filing a "Request for Reconsideration." Pet. App. 3a. Again using the standard language contained on forms generated by the SSA, petitioner represented that she "continue[d] to be disabled," *ibid.* (quoting Request for Reconsideration Sept. 14, 1994). Petitioner also stated that her employer terminated her because she "could no longer do the job because of [her] condition." *Ibid.* (quoting Work Activity Report submitted in conjunction with the Request for Reconsideration). Petitioner filed a second "Request for Reconsideration" in January 1995, reaffirming that she was "unable to work," *ibid.*, again using the standard language in SSA forms.

Petitioner made no statement about her ability to perform her prior job with reasonable accommodations in any of her submissions to the SSA, and she was not asked to make such a statement. The matter was subsequently referred to an administrative law judge (ALJ), who, in September 1995, awarded petitioner disability benefits effective retroactively to January 7, 1994. *Ibid.*

3. a. One week before the ALJ's decision, petitioner brought this suit under the ADA. Pet. App. 3a-4a. She claimed that respondent terminated her employment because of her disability. Complaint ¶ 7. Peti-

tioner further alleged that respondent unlawfully failed to accommodate her disability. *Ibid.*

Respondent moved for summary judgment, arguing that petitioner "could not establish a prima facie case under the ADA, as her representations in her application for, and her receipt of, social security disability benefits estopped her from claiming that she is a 'qualified individual with a disability.'" Pet. App. 4a.[1] In response to the motion, petitioner submitted an affidavit detailing various accommodations that she had requested and alleging that all of the accommodations were denied. See Affidavit of Carolyn C. Cleveland 3. Petitioner's affidavit also alleged that her condition worsened as a consequence of her firing. *Ibid.* Petitioner also submitted an affidavit from her physician stating, "[p]rior to [petitioner's] termination, I had anticipated that [she] would ultimately reach a near 100% recovery" but, following her termination, "she became depressed and her aphasia became worse." Affidavit of Steven P. Herzog, M.D. 2. Petitioner's physician opined that "had [petitioner] been given training time and assistance on the job, instead of being terminated, she would have continued to recover from the stroke." *Ibid.* The district court granted summary judgment for respondent. Pet. App. 4a.

b. On appeal, the Fifth Circuit affirmed the district court's grant of summary judgment. Pet. App.

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[1] "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." Pet. App. 8a. The doctrine seeks "to protect the integrity of the judicial process" by preventing a party from "speak[ing] out of both sides of her mouth with equal vigor and credibility." *Id.* at 8a & n.10 (internal quotation marks omitted).

1a-13a. The court first rejected "a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA." *Id.* at 8a. The court recognized that, because of the different legal standards involved, claims under the Social Security Act and the ADA "would not necessarily be mutually exclusive." *Id.* at 9a. The court nonetheless adopted a standard that calls for the application of estoppel in the vast majority of cases in which an individual applies for or receives Social Security disability benefits.

Specifically, the court ruled that "the application for or the receipt of social security disability benefits creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" Pet. App. 11a. The court opined that an individual would be able to overcome that presumption, if at all, only "under some limited and highly unusual set of circumstances." *Id.* at 9a. Applying that standard, the court ruled that petitioner had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.'" *Id.* at 12a.

Petitioner sought rehearing. The Equal Employment Opportunity Commission (EEOC) filed a brief as *amicus curiae* in support of petitioner. Pet. App. 18a-35a. The panel denied the petition for rehearing without explanation. *Id.* at 16a.

DISCUSSION

The Court should grant the petition for certiorari. The courts of appeals are in considerable disarray

over the impact that an employee's application for or receipt of Social Security disability benefits should have on the employee's claim under the ADA. Moreover, the rule stated by the Fifth Circuit in this case has been adopted by no other circuit, is inconsistent with the position of the EEOC and the SSA, the agencies which administer the two statutes at issue, and is incorrect. For those reasons, and because the issue is important to the effective enforcement of the ADA, review by this Court is warranted.

1. The Fifth Circuit's decision is inconsistent with the views of every other court of appeals that has addressed the question presented by this case. No other court of appeals has held that an employee's application for or receipt of Social Security disability benefits creates a presumption that the employee is judicially estopped from asserting that she is a "qualified individual with a disability" under the ADA. No other court of appeals has limited a Social Security applicant's ability to establish her qualification to raise an ADA claim to a "limited and highly unusual set of circumstances." Pet. App. 9a.

a. The courts of appeals have divided several ways over the proper legal effect to accord application for or receipt of Social Security disability benefits in a subsequent ADA action. The largest group has rejected estoppel and held that statements made in support of a benefit claim should be analyzed "under traditional summary judgment principles" as relevant evidence bearing on the qualification issue. See *Griffith*, 135 F.3d at 383; accord *Rascon* v. *U.S. West Communications, Inc.*, No. 96-2194, 1998 WL 223465, at **6-10 (10th Cir. May 6, 1998); *McCreary* v. *Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164-1165 (7th Cir. 1997); *Swanks* v. *WMATA*, 116 F.3d 582, 584-587 (D.C. Cir. 1997).

One circuit, although rejecting estoppel, has imposed a heightened burden of proof on ADA plaintiffs who previously claimed Social Security disability benefits. See *Moore* v. *Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) (plaintiff must produce "strong countervailing evidence" to overcome prior sworn statements of disability).[2]

Still other courts of appeals have ruled that estoppel may be appropriate in certain circumstances but that, in most cases, an application for Social Security disability benefits and an ADA claim will be reconcilable. See *Johnson* v. *Oregon*, 141 F.3d 1361, 1366-1370 (9th Cir. 1998); *Talavera* v. *School Bd.*, 129 F.3d 1214, 1217-1220 (11th Cir. 1997); *Krouse* v. *American Sterilizer Co.*, 126 F.3d 494, 501-503 & nn.3-5 (3d Cir.

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[2] The Eighth Circuit's views are somewhat unclear. The *Moore* panel cited *Dush* v. *Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997), in support of a heightened evidentiary standard. Although *Dush* indeed imposed a "particularly cumbersome" "burden," *ibid.*, the opinion reserved "the question of whether and to what extent judicial estoppel, or some other form of estoppel, will operate to prohibit someone who has formerly claimed to be 'totally disabled' from making out a prima facie ADA case." *Id.* at 962 n.8. The *Dush* panel noted that prior opinions of the Eighth Circuit conflicted on the applicability of estoppel. See *ibid.* (citing *Robinson* v. *Neodata Servs., Inc.*, 94 F.3d 499, 501-502 (1996) (rejecting estoppel); *Eback* v. *Chater*, 94 F.3d 410, 412 (1996) (noting lack of direct relationship between ADA and Social Security standards); and *Budd* v. *ADT Sec. Sys., Inc.*, 103 F.3d 699 (1996) (per curiam) (affirming application of estoppel)). The panel concluded that "the issue, at least for the time being, remains open in our Circuit." *Dush*, 124 F.3d at 962 n.8.

1997).[3] In those courts, "in most cases, * * * '[s]traightforward summary judgment analysis, rather than theories of estoppel,' will be appropriate." See *Johnson*, 141 F.3d at 1369; accord *Talavera*, 129 F.3d at 1220 (estoppel applies only to prevent disavowal of specific statements that are actually inconsistent with current claim); *Krouse*, 126 F.3d at 503 n.5 (courts should not apply estoppel without first applying two-part test of *Ryan Operations G.P.* v. *Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), which requires that two positions be actually inconsistent and that either or both of the inconsistent positions have been taken in bad faith).

Only the Fifth Circuit has adopted a presumption that an employee is estopped from maintaining an ADA claim whenever he or she has applied for or received Social Security disability benefits. By that court's own lights, that presumption, although "theoretically" rebuttable, results in dismissal of ADA claims in most cases in which there has been an application for benefits. See Pet. App. 8a-9a; page 7, *supra*. Other courts have acknowledged that repre-

[3] In *McNemar* v. *The Disney Store, Inc.*, 91 F.3d 610 (1996), cert. denied, 117 S. Ct. 958 (1997), the Third Circuit initially seemed to adopt an almost per se estoppel rule. In *Krouse*, however, the Third Circuit explained that *McNemar* was tied to its "unique facts" and admonished district courts in the Circuit not to assume that "*McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record." 126 F.3d at 503 n.5. Although the Third Circuit conjectured that the court, sitting en banc, might "revisit the issue of judicial estoppel in this type of case," *id.* at 503, it continues to be the position of the Third Circuit that estoppel can be applied, in at least some cases, to bar an otherwise viable claim of disability discrimination.

sentations made to support a benefits claim may be relevant to the issue of qualification in an ADA case; but none of those courts has burdened every plaintiff who has applied for benefits with a legal presumption of estoppel. Consequently, the ability of a disability applicant or beneficiary to maintain an ADA claim will be substantially affected by the circuit in which the claim is brought.

b. Contrary to respondent's assertion (Br. in Opp. 9), the disagreement among the courts of appeals is not "more form than substance." A survey of the reported cases confirms that there are practical consequences to the difference between the Fifth Circuit's rule and the standards applied by other courts of appeals. Since the Fifth Circuit issued its opinion in this case, several district courts in that Circuit have applied judicial estoppel to bar ADA claims. See, *e.g.*, *Graf* v. *Wal-Mart Stores, Inc.*, No. CIV. A. G-97-410, 1998 WL 244263, at *2 (S.D. Tex. May 12, 1998); *Lefler* v. *E-Sys., Inc.*, No. CIV. A. 3:96-CV 1007, 1998 WL 61908, at **2-4 (N.D. Tex. Feb. 6, 1998); *Bailey* v. *Teachers' Retirement Sys.*, No. CIV. A. 96-2339, 1998 WL 4484, at **3-4 (E.D. La. Jan. 6, 1998); *Robertson* v. *Neuromedical Ctr.*, 983 F. Supp. 669, 672-673 (M.D. La. 1997); *Pena* v. *Houston Lighting & Power Co.*, 978 F. Supp. 694, 698-699 (S.D. Tex. 1997); *Bazile* v. *AT & T-Bell Labs., Inc.*, No. CIV. A. 3:96-CV-2652-G, 1997 WL 600702, at *3 (N.D. Tex. Sept. 19, 1997), aff'd, 142 F.3d 1279 (5th Cir. 1998) (Table). Those courts have read the circuit court's opinion in this case as precluding ADA claims in most cases in which an individual has applied for Social Security disability benefits. See also *McConathy* v. *Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 562-563 (5th Cir. 1998) (dismissing ADA claim).

The approach of the district courts reflects the manner in which the court of appeals applied the presumption in petitioner's case. The court of appeals failed to discuss the evidence that might have rebutted the presumption that petitioner's award of disability benefits conflicted with her claim that she was qualified, at the time of her discharge, to perform the essential functions of her job with reasonable accommodation. Specifically, the court of appeals did not discuss the evidence that petitioner requested and was denied accommodations, might have recovered from the stroke had respondent made those accommodations, but instead became more disabled as a result of her discharge. Instead, the court of appeals focused exclusively on petitioner's use of standard language contained on SSA forms that asserted her disability and inability to work, without even considering what that language means in the context of the Social Security disability program. Pet. App. 12a. As a result, the Fifth Circuit's ruling effectively treats an application for Social Security disability benefits as an absolute legal bar to the assertion of an ADA claim. We have not found any decision issued in the Fifth Circuit subsequent to the opinion in this case that permits an ADA claim when the claimant previously applied for or received Social Security disability benefits.

In those circuits with a different rule, the picture is decidedly different. For example, the Sixth, Seventh, Ninth, and Eleventh Circuits have all reversed district court decisions granting summary judgment to employers in cases in which the plaintiffs applied for Social Security disability benefits and asserted that they were "unable to work." See *Griffith*, 135 F.3d at 378-384; *McCreary*, 132 F.3d at 1163-1165;

Johnson, 141 F.3d at 1370; *Taylor* v. *Food World, Inc.*, 133 F.3d 1419, 1422-1423 (11th Cir. 1998); *Talavera*, 129 F.3d at 1217-1220. The D.C. Circuit has similarly reversed a district court's grant of summary judgment based on the theory that application for or receipt of Social Security disability benefits bars an ADA claim. See *Swanks*, *supra*. Finally, the Tenth Circuit has upheld judgment for an ADA plaintiff who had stated to the SSA that he was "disabled and unable to work," as those terms are used by the SSA. See *Rascon*, 1998 WL 223465, at **5, 15. Clearly, the standard that a court applies to assess the effect on an ADA claim of statements made in support of a claim for disability benefits has a profound impact on the plaintiff's ability to maintain his ADA claim.

2. The Fifth Circuit's presumption of judicial estoppel not only conflicts with the holdings of the other courts of appeals, but it is also inconsistent with the views of the two agencies that administer the relevant statutes and is incorrect. Both the SSA and the EEOC have concluded that, although statements made in applying for Social Security disability benefits may be relevant evidence in a subsequent ADA suit, application for or receipt of benefits is not by itself inconsistent with being a "qualified individual with a disability" under the ADA. See *EEOC Guidance* at 70:1251-1252, 70:1254-1257, 70:1259-1266; *Swanks* Brief, Pet. App. 36a-50a; *SSA Guidance* App. 15-400-402; Pet. App. 18a-35a. The majority of the courts of appeals have correctly held that application for or receipt of benefits alone neither supports judgment as a matter of law for the defendant nor creates a presumption that the plaintiff is estopped from establishing that she is a "qualified individual with a disability."

a. Application for or receipt of Social Security disability benefits is often fully consistent with a valid ADA claim, because the determination whether someone is eligible for disability benefits differs in several material ways from the determination whether that person is a "qualified individual with a disability." First, an individual is "qualified" under the ADA if he can do the essential functions of his job *with reasonable accommodation*. See 42 U.S.C. 12111(8). In contrast, when the SSA, at step four of the sequential evaluation process, considers whether an individual can perform his "past relevant work," see 20 C.F.R. 404.1520(e) and (f), the SSA does not consider potential accommodations that his prior employer did not actually make. Nor does the SSA speculate whether other employers might be required by the ADA to make specific accommodations, when, at step five, the SSA determines whether the claimant could perform other work that exists in significant numbers in the national economy. See *Swanks* Brief, Pet. App. 43a-44a; Pet. App. 10a. Because many ADA cases, including this one, turn on disputes over reasonable accommodations rather than whether the plaintiffs could work without any accommodations, that difference between Social Security and ADA claims is very significant.

Second, although a person may qualify for Social Security disability benefits by the application of generalized presumptions about his inability to work, the determination whether someone is "qualified" under the ADA must be an individualized decision about his ability to perform the essential functions of a particular job. See *Overton* v. *Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992); *EEOC Guidance* at 70:1251. Because of the reliance on generalized presumptions, a finding

that a person is disabled for purposes of Social Security benefits does not mean that there is no job that he or she can actually perform. For example, at step three of the Social Security determination process, an individual with an impairment listed in the regulations is conclusively presumed to be "disabled" and "unable to work" without any inquiry into his ability to do his past work. See 20 C.F.R. 404.1520(d), 404.1525, 404.1526; *Swanks* Brief, Pet. App. 39a, 44a-45a; see also *Whitbeck* v. *Vital Signs, Inc.*, 116 F.3d 588, 591 (D.C. Cir. 1997); Pet. App. 10a.

Similarly, at step five of the determination process, the SSA can award disability benefits to an individual who is able to perform sedentary, light, or even medium work, based on generalized presumptions that his age, education or lack of transferrable skills from past employment make it unlikely that he could adjust to other work for which he is qualified. See *Heckler* v. *Campbell*, 461 U.S. at 460-462. An award of benefits at step three based on a claimant's possession of a listed impairment or an award of benefits at step five may well have little relevance to an ADA claim.

Third, the Social Security Act and SSA regulations allow disability insurance benefit recipients a trial work period of up to nine months during which their benefit entitlement and payment levels remain unchanged. See 42 U.S.C. 422(c), 423(e)(1); 20 C.F.R. 404.1592; *Overton*, 977 F.2d at 1192. Individuals can also remain entitled for a further period of time to benefits in any month in which their earnings fall below a statutory level. See 20 C.F.R. 404.1592a. Those work incentives reflect both the Social Security Act's purpose to encourage individuals with disabilities to work whenever possible, see 42 U.S.C. 422(a); *Mohamed*, 944 F. Supp. at 284, and the fact that

a person's disability status frequently changes over time, see, *e.g.*, *D'Aprile* v. *Fleet Servs. Corp.*, 92 F.3d 1, 4 (1st Cir. 1996) (receipt of disability benefits under private plan not inconsistent with state law discrimination claim because plaintiff claimed disability developed after, and as a result of, discharge). The work incentives demonstrate that Congress has recognized that persons who legitimately apply for and receive Social Security disability benefits may nonetheless be or become able to work.

b. Because a "qualified individual with a disability" will often be entitled to Social Security disability benefits, the Fifth Circuit erred in holding that an employee's application for or receipt of benefits creates a presumption that she is judicially estopped from asserting she is "qualified." Judicial estoppel is properly invoked only when a litigant seeks to advance a position that conflicts with a prior position.[4] See 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4477 (1981 & Supp. 1996); cf. *Davis* v. *Wakelee*, 156 U.S. 680, 689-691 (1895) (upholding equitable estoppel when defendant had asserted in prior litigation a contrary position on which plaintiff had relied).[5] Presumptions, in turn, are appropriate

[4] The doctrine of judicial estoppel has not been universally embraced. At least two courts of appeals have refused to recognize the doctrine, see *UMWA 1974 Pension* v. *Pittston Co.*, 984 F.2d 469, 477-478 (D.C. Cir.), cert. denied, 509 U.S. 924 (1993); *United States* v. *49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986), as have many other jurisdictions. See *Konstantinidis* v. *Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980). This Court, however, need not decide whether judicial estoppel may be applied in the federal courts in order to resolve the question presented by this case.

[5] See also, *e.g.*, *Moore*, 139 F.3d at 1212; *Simon* v. *Safelite Glass Corp.*, 128 F.3d 68, 72-73 (2d Cir. 1997); *Rissetto* v.

only when proof of a particular fact makes the existence of another fact sufficiently probable that "it is sensible and timesaving to assume the truth of [that other fact] until the adversary disproves it." 2 *McCormick on Evidence* § 343, at 454-455 (John W. Strong ed., 4th ed. 1992).

The fact that an individual has applied for or received Social Security disability benefits hardly makes it probable that the disability and ADA claims are in conflict. The two statutes serve persons with mental and physical impairments in complementary ways. Social Security disability benefits provide income replacement for a person during a period when he is prevented from working because of a disability, and the ADA provides a mechanism for that person to obtain workplace accommodations that will permit a return to work. There is simply no inherent conflict between the two claims.

3. This case warrants this Court's review because use of judicial estoppel to bar otherwise meritorious claims frustrates effective enforcement of the ADA. Congress enacted the ADA because individuals who experienced discrimination on the basis of a disability "often had no legal recourse to redress such discrimination." 42 U.S.C. 12101(a)(4). The Act seeks "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). In enacting the ADA, Congress assumed that many individuals on the disability benefit rolls could, with assistance or

Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996); *Ryan Operations*, 81 F.3d at 361; *UMWA 1974 Pension*, 984 F.2d at 477; *Astor Chauffeured Limousine Co.* v. *Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547-1548 (7th Cir. 1990); *49.01 Acres of Land*, 802 F.2d at 390; Pet. App. 8a.

accommodation, obtain employment. See H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 32-33 (1990). Congress envisioned the ADA's reasonable accommodation requirement as a device for alleviating the "staggering levels of unemployment and poverty" among the approximately "8.2 million people with disabilities [who] want to work but cannot find a job," the majority of whom are dependent upon "insurance payments or government benefits for support." *Ibid.* Thus, Congress envisioned that the ADA would provide a cause of action for many individuals *receiving* Social Security benefits that would enable them to overcome discrimination and to return to work.

The Fifth Circuit's estoppel rule impedes the objectives of the ADA by depriving most applicants for and recipients of Social Security disability benefits of their right to pursue claims of discrimination under the ADA. Individuals with potentially meritorious ADA claims frequently apply for disability benefits following their discharge from employment in order to support themselves. They apply for (and often properly receive) benefits because they face real-world barriers to employment, even though they could work with reasonable accommodations. They are therefore "qualified individuals with disabilities" under the ADA, who may have a right to accommodations that will enable them to return to work, as Congress envisioned. The rule adopted by the Fifth Circuit, however, improperly bars them from maintaining actions under the ADA and thus increases the likelihood that they will remain on the benefit rolls.[6]

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[6] Some ADA defendants have argued that permitting a disability beneficiary to maintain a suit under the ADA would lead to an improper "double recovery." See *Swanks*, 116 F.3d at 587. That argument lacks merit. First, the court passing on the ADA claim may consider whether the possibility of a double recovery warrants offsetting the amount of disability benefits that the plaintiff received against any make-whole relief the court awards in the ADA suit. See *ibid.*; cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-363 (1995) (courts should limit relief under Title VII to take into account after-acquired evidence of employee wrongdoing); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 n.14 (1974) (judicial relief under Title VII can be structured to avoid possible windfall gains when employee prevails in contract arbitration and also brings court action). Second, if an individual is reinstated to a job as a remedy for an ADA violation, the individual will lose his or her disability benefits at the end of the trial work period, see page 15, *supra*.

That result frustrates the purposes of the ADA not just in individual cases but on a broader level as well. As this Court has recognized, "the private litigant [suing under anti-discrimination statutes like the ADA] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The Court has therefore rejected application of equitable bar doctrines to private actions under federal statutes that serve "important public purposes." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995) (quoting *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138 (1968)). Because the objectives of the anti-discrimination statutes are furthered "when even a single employee establishes that an employer has discriminated against him or her," courts may not "bar all relief for an earlier violation of the Act" because the employee has engaged in wrongdoing. *McKennon*, 513 U.S. at 358-360. Judicial estoppel is precisely the kind of equitable bar that this Court has criticized. See *Griffith*, 135 F.3d

at 382 (judicial estoppel undermines the "truth-seeking function of the court" by pretermitting potentially meritorious claims).

Invocation of judicial estoppel is particularly inappropriate in cases like this one, because there is no reason to believe that petitioner, or other applicants for disability benefits who later bring ADA claims, have sought to mislead or have otherwise engaged in any wrongdoing. Because receipt of disability benefits is generally fully consistent with a meritorious ADA claim, the Fifth Circuit's rule improperly bars potentially legitimate claims and poses a substantial threat to the effective enforcement of the ADA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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